

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAMELA G. CAPPETTA,

Plaintiff;

v.

Civil Action

3:08CV288

GC SERVICES LIMITED PARTNERSHIP,

Defendant.

November 4, 2009
Richmond, Virginia
9:20 a.m.

BEFORE: HONORABLE JAMES R. SPENCER
Chief United States District Judge

APPEARANCES: LEONARD A. BENNETT, ESQ.
MATTHEW J. ERAUSQUIN, ESQ.
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Newport News, Virginia 23606

Counsel for Plaintiff;

CHARLES M. SIMS, ESQ.
JOHN M. ROBB, III, ESQ.
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Counsel for Defendant.

JEFFREY B. KULL
OFFICIAL COURT REPORTER

P-R-O-C-E-E-D-I-N-G-S

THE CLERK: Case Number 3:08CV288: Pamela G. Cappetta versus GC Services Limited Partnership. The plaintiff is represented by Leonard Bennett and Matthew Erausquin. The defendant is represented by Charles Sims and John Robb. Are counsel ready to proceed?

MR. SIMS: We are, Your Honor.

MR. BENNETT: We are, Judge.

THE COURT: We are here on the defendant's motion for sanction. I will hear that. And after that we will have a status conference.

MR. SIMS: Good morning, Your Honor. I'm going to be brief today. This matter has been fully briefed before the Court. And I think it is really relatively straightforward in connection with the letter that was sent out to over 3,400 people identified in confidential information that was produced in this case.

But I think what's important for the Court to understand is, in essence, something that really is hard to convey in the papers. And that's really the disappointment that our client has.

In this case, there has been a dispute going back and forth with respect to discovery. And I think the Court is aware, our client has always believed that it was required to produce a whole lot more information that

1 wouldn't have any conceivable relevance to this case. But
2 it did so with the view that there was a protective order
3 entered in place that would protect the confidentiality of
4 this information. It never envisioned that the
5 information we were disclosing on 566,000 American Express
6 accounts that had been submitted to GC Services for
7 collection, that out of that sampling of 566,000 people,
8 that the plaintiffs could send out a mass mailing of over
9 3,400 letters to those individuals. And as far as we can
10 tell from the papers we got in response, there was really
11 no science to that other than that these people happened
12 to be located in Virginia and they were basic cardholders.

13 Well, this is a case involving a supplemental
14 cardholder, not a basic cardholder. And the message the
15 letter that goes out to these 3,400 people is not a
16 request for information; it is an indictment on GC
17 Services. The opening sentence is an indictment. You
18 know, "We are a law firm currently litigating a federal
19 case against GC Services. We have learned that you were
20 also one of the individuals from whom GC Services
21 attempted to collect American Express." That is
22 information learned, that's confidential information
23 learned from those 566,000 accounts. So they are
24 disclosing that information to these folks. They say in
25 the next sentence: "Over the course of this case we have

1 learned that GC Services regularly contacts family members
2 and neighbors." Then it goes on to say they make false
3 statements. "GC Services makes false statements to entice
4 you or to encourage you to pay the debt." And then in the
5 penultimate sentence at the very end, Your Honor, there
6 is -- they finally, after a full paragraph, ask, "I would
7 like to speak with you in further detail about the conduct
8 of GC Services."

9 Well, Your Honor, if that was their main intent,
10 I think that could have been said in the first sentence.
11 It could have been "We believe you might have information
12 pertinent to a case that we are litigating in the Federal
13 District Court in the Eastern District of Virginia. We
14 would like to contact you. Would you be agreeable to
15 that?" But that's not really what their purpose is in
16 this letter, shown by the first paragraph. And then if
17 you read, continue on reading, what they say in here is,
18 after that sentence, in that same sentence where they are
19 asking that they would like to speak with you about
20 detailing the conduct, they say, "and to address any
21 particular concerns you may have."

22 They invited the recipients -- they have told
23 the recipients the concerns they should have. They then
24 invited that recipient to call them back so this law firm
25 could address those concerns. That's not a request for

1 information. That's a solicitation for me to go represent
2 you to address and correct your concerns that we have
3 just -- that you ought to have which we have just
4 outlined.

5 Well, Your Honor, we have a protective order in
6 place here. And these protective orders are used, and I
7 know this Court is familiar with them, in just about every
8 case now, protective orders are entered. And you do that
9 so that you can produce information. And you have to arm
10 twist your clients but you say, "Look, you can produce
11 this information, but it is going to be protected. They
12 can only use it in this litigation."

13 Well, this is an abuse of that. And you cannot,
14 as you read these protective orders, it is impossible to
15 go through and outline every negative, every circumstance
16 that you should not use this information. So the parties
17 do the opposite. They tell the Court and each other in
18 these protective orders what you can use the information
19 for. And it is pretty clear what the purpose of this
20 protective order is. The purpose of the protective order
21 is to say to the litigants, "We are going to hand over
22 confidential information but you can only use it for
23 purposes of this case." That's the overriding purpose
24 behind this protective order.

25 And it is made clear in Paragraph 4, where it

1 says, "It shall not be used directly or indirectly by any
2 person for any business, commercial, or competitive
3 purposes or for any purpose whatsoever other than solely
4 for the preparation of trial."

5 Even if this Court were to believe that this
6 letter could be conceived as a request for information
7 from these 3,400 recipients, it is not solely a request.
8 It is not solely for the purpose of gaining information
9 relative to this case. It is more than that. They used
10 the information in breach of the protective order, Your
11 Honor. Because what they are really trying to get is more
12 clients.

13 And in their responsive papers, I think a fair
14 assessment of what they respond is they are making
15 excuses. The basic excuse for what they are doing, Your
16 Honor, is, "Well, this is to our client's advantage."
17 That's not an excuse. That doesn't get you around the
18 protective order. We can't have litigants out there
19 saying, "Well, it is to my client's advantage to take this
20 course of action irrespective of what the protective order
21 states." That makes a mockery of the protective order.

22 And I would suggest to the Court that this is a
23 serious and important issue, because litigants every day
24 are entering into these protective orders and they have to
25 believe that there are limitations on what you can do with

1 this information. And I don't think any litigant walking
2 into this Court having a protective order, which this is
3 pretty basic similar language, would ever believe that the
4 other litigant would take the information and do mass
5 mailings that skewer your client and then invite the
6 recipient to call back so that they can be address their
7 concerns.

8 So Your Honor, we ask this Court to find that
9 there has been a breach of the protective order. We
10 struggled as to what is the appropriate remedy here. We
11 believe that the only appropriate remedy is for this
12 counsel not to be class counsel. They have shown a
13 disregard for this Court's protective orders. It is too
14 difficult to dig into each individual person who may have
15 contacted them -- like I said, they have 60 clients -- to
16 find out whether in fact that person invited themselves to
17 be a client or whether it was in response to this letter.
18 It gets into attorney/client privilege. It gets into
19 issues that creates an overriding morass. So we think
20 this is the only appropriate remedy to rectify this breach
21 and that's what we have asked for.

22 THE COURT: That's assuming there is a class
23 certification.

24 MR. SIMS: That's right. Because otherwise,
25 Your Honor, and I think it is telling that at no time has

1 counsel ever supplemented their discovery to identify any
2 person who responded to these letters, to say, "Oh, this
3 person has information relevant to this case." There is
4 no supplementation.

5 THE COURT: All right. Mr. Bennett?

6 MR. BENNETT: Judge, the latter is not true. We
7 actually did supplement to include these individuals.

8 THE COURT: What were you doing, Mr. Bennett?
9 Really, this is kind of irritating to me. Because I reach
10 out, I stretch out to give you as much discovery as I
11 think you are entitled to, and then you turn around and do
12 this mass mailing. And you have got to be a blind man not
13 to read this letter and see the undercurrent to it. Go
14 ahead.

15 MR. BENNETT: Judge, I understand that. The
16 question is what happened from that. That was done before
17 the discovery cutoff, and I understand the argument that
18 we would be farming new cases. But we didn't. In fact,
19 we have sought to move to consolidate, to add these
20 individuals. The defendant has taken the position
21 throughout the case that there was nobody else exposed in
22 the same way that Ms. Cappetta has. What was done here
23 was telegraphed when we were arguing before Judge Lauck
24 why we needed this information, was to contact these
25 individuals. The reason that we used Virginians was they

1 were individuals that we could subject to subpoena. These
2 individuals have been disclosed as potential witnesses.

3 And the question is, Judge, if there were
4 circumstances where we said, "All right, we have that
5 information, we are moving on," that's a different
6 circumstance than in this case in which we have sought to
7 take these additional reps, who already would fit within
8 the original proposed class definition in the Cappetta
9 case, the original class definition before the defendants
10 said it was only supplementals, these individuals have fit
11 within that definition. It is part of that action. We
12 have sought to consolidate the actions in part because the
13 reasons related to settlement with the insurance policy is
14 limited in the definition of what is a claim. We have not
15 increased the demand. We have not changed our posture or
16 position in the litigation with respect to these
17 individuals. We are not taking this in a new path. They
18 are for the single prosecution of this action.

19 That's it, Judge. And I understand, we are not
20 solicitors. That's not what we do. I'm not in the phone
21 book. We are inundated, as Your Honor knows, from our
22 docket. But in order to prosecute the case and refute the
23 arguments that the defendant is making and has made again
24 and again that this is an aberration, that Pamela
25 Cappetta's facts and circumstances are novel, unique,

1 and -- I mean, in December of '08 when we were arguing
2 much of these same matters the defendant wrote in its
3 pleading, in its opposition to our motion to amend, quote,
4 "Plaintiff admits that she has not identified any other
5 putative plaintiff that has suffered the alleged injury as
6 she under the FCRA." This was repeated in arguments and
7 pleadings in May before this Court of this year, and it
8 was repeated even in the motion opposing certification.
9 The defendant says that we have failed to identify a
10 single other person who allegedly was named and reported
11 as the supplemental cardholder without his or her
12 knowledge.

13 The defense in this case has always been that
14 this did not happen in this fashion to other individuals.
15 Now, I absolutely get it, Judge. And I appear before Your
16 Honor and I appear before this Court, and my background
17 and my integrity is at issue here. We have never had a
18 Rule 37(c) conference, the rule under which this is
19 prosecuted, in which any of these things could be issued.
20 And the defendant prosecutes this for the very reason and,
21 based on Your Honor's initial reaction, successfully in
22 that regard, for the attempts to shift the Court's
23 perception of us.

24 THE COURT: The protective order has to mean
25 something.

1 MR. BENNETT: The order says we can only use
2 this information in furtherance of this case. That's what
3 we have done. We have not done anything else at all. In
4 fact, we have proven, Your Honor, by our motions to
5 consolidate, in our status order when we first filed these
6 additional cases, that it is that single purpose. When we
7 filed our motion for class certification, we represented
8 to Your Honor two alternate proposed class definitions.
9 And the defendant has taken the position initially that it
10 was just supplementals, and even then it was an
11 aberration. We can prove now, we have evidence, we can
12 prove, and we have disclosed these individuals, that
13 that's not in fact so.

14 But I would not do this, Judge. I wouldn't do
15 it in my practice, and it is not what was done here. And
16 in fact, it was only done with individuals within subpoena
17 of Richmond and it was only done until the close of
18 discovery. That's it. Nothing else since.

19 I would suggest, Judge, that again in terms of
20 candor, we have never hidden the purpose of doing this
21 from the defendant. We have told the defendant and we
22 told Judge Lauck that; we argued that we needed these
23 witnesses. We need them to show willfulness, to show not
24 bona fide error, and we need them to show it certainly is
25 not an aberration, Judge.

1 I would not do it, we did not do it, and the
2 best, the most objective evidence you have of that is that
3 no use has been made of these individuals other than
4 prosecuting this case.

5 THE COURT: All right.

6 MR. SIMS: If I may briefly, Your Honor, the
7 second amended complaint, the class, proposed class in the
8 second amended complaint was "All natural persons with
9 addresses within the United States who are listed only as
10 non-obligor supplemental cardholders on any account." So
11 I disagree with counsel that as proposed in the second
12 amended complaint, the class, the purported class,
13 encompassed basic cardholders, which is to whom all 3,400
14 letters were sent.

15 But I would suggest to the Court that what
16 counsel seems to be arguing is he had good reason to
17 breach the protective order. But if he had good reason,
18 Your Honor, he could have come into this Court and sought
19 a modification of the protective order. He could have
20 come into this Court and said, you know, "Your Honor, we
21 are just not getting the information from the defendants
22 that we think we ought to get, so we are proposing to go
23 out with a mass mailing of 3,400 letters and we are going
24 to ask people for any information they may have." And I
25 think he could have gotten that order.

1 But he didn't do that, Your Honor. We didn't
2 know, we found this letter searching blogs. It is on a
3 blog out there. So not only has that letter been mailed
4 to 3,400 people; it now has worldwide publication because
5 it is sitting on the Internet, Your Honor. And it clearly
6 is used, was used as an abuse of the protective order
7 because it used confidential information to go out and
8 solicit clients, Your Honor.

9 THE COURT: All right. I will take that motion
10 under advisement and try to figure out how to resolve it,
11 what I am going to do about it. We need to talk about the
12 case itself. I think we are scheduled for what, the 17th
13 or thereabouts. And I really have to apologize to you
14 all, because the certification ruling hasn't come down. I
15 would have preferred to have done that by now. You all
16 need that information, and that's clear.

17 I don't think we are going to be able to make
18 this trial date. I'm working now, we will try to get it
19 to you as soon as we possibly can, a resolution on the
20 class certification. It is a little bit more complex than
21 I initially thought. And let me suggest this: Let's keep
22 that 17th date as another status hearing date. I'm going
23 to try to get this class certification done. Obviously,
24 if it goes one way we will be able to proceed in a more
25 swift fashion. If the class is certified, then we have to

1 expand the number of days for trial and might have to take
2 a little bit more time with it. But I think that's the
3 best that we can do here.

4 Plaintiff has apparently a motion for sanctions
5 also outstanding. Mr. Bennett?

6 MR. BENNETT: Judge, we have actually three sets
7 of motions or three motions outstanding, and we
8 would -- I'm not big on suggesting delay, but in terms of
9 judicial economy, part of what's sought in the motion
10 for -- our motion for sanctions is exclusion of evidence.
11 And so that it would probably make sense if Your Honor
12 sorted out everything else for much of that being moot and
13 saving the Court judicial resources in that interim. Your
14 Honor certainly knows your job better than me.

15 THE COURT: We will get it all off the docket
16 sheet. But I think this is the best that we can do at
17 this point. By taking it off the trial calendar, that
18 will release you all from the trial preparation deadlines
19 and give you time to do something else. But again, I
20 apologize for this, because it is our fault for not being
21 able to get to it in a timely fashion.

22 MR. BENNETT: We provided you with hundreds of
23 thousands of total documents, Judge. May I be heard on
24 one related matter? In terms of simplification, and the
25 hesitation we had in filing our motions to consolidate

1 that we telegraphed on the claims of the two other
2 complaints that fit within the proposed definition in our
3 motion for certification, the broader of the two, but not
4 within the second amended complaint definition, and what
5 I -- my hesitation in moving -- we wanted to move to
6 consolidate so it was clear to Your Honor what our plan
7 was with respect to the issue that we have just addressed
8 so that it wouldn't -- we think it to be a false
9 accusation -- wouldn't be there or linger.

10 But the hesitation was that it could complicate,
11 depending on the -- if you rule against us on the sort of
12 macro issues of certification, then it would apply to all
13 of them. But if ultimately you rule in our favor on the
14 Cappetta motion for certification, then, or rule against
15 us on the Cappetta specific, the individualized issues
16 argument, then we are left with these two additional cases
17 that to say that they are related is a dramatic
18 understatement. They are really subsets of the same
19 litigation. And so I don't mean to add additional
20 complexity to Your Honor's already complex ruling on
21 certification, but at least if Your Honor wants us to act
22 in a certain way with respect to those, our intent had
23 been to file an immediate motion for certification. But
24 we have deferred doing that because we don't want to pile
25 on the Cappetta matters.

1 THE COURT: All right. Thank you all very much.

2 You you will hear from me.

3 (Proceedings adjourned at 9:44 a.m.)

4 CERTIFICATE OF REPORTER

5 I, Jeffrey B. Kull, Official Reporter, certify that
6 the foregoing is a correct transcript from the record of
7 proceedings in the above-entitled matter.

8

9

10 _____/s/_____

11 Jeffrey B. Kull,
12 Official Federal Reporter

13

14 _____/s/_____

15 Date

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